care assistance programs, for the purpose of applying the provisions of section 414(n), and for the purpose of applying the provisions listed in section 414(n)(3), with respect to such other benefits, plans, or programs as are described in section 414(n)(3), the term 'employee' shall include, with respect to a qualified staffing firm, any individual whose employer is considered to be the qualified staffing firm for the purpose of Chapter 21, 23, and 24. For these purposes, a change in the employment relationship between an individual and a qualified staffing firm or between the individual and a customer or former customer of the qualified staffing firm, as the case may be, whereby the individual becomes or ceases to be an employee of the qualified staffing firm under this subparagraph, shall be treated as the termination of employment and separation from service by the individual from the employment or service of the qualified staffing firm's customer or the qualified staffing firm, as the case may be.''.

SEC. 4. TREATMENT OF LEASED EMPLOYEES IN EMPLOYEE BENEFIT PLANS.

(a) APPLICATION OF REQUIREMENTS CONCERNING CASH OR DEFERRED ARRANGEMENTS, MATCHING CONTRIBUTIONS, AND EMPLOYEE CONTRIBUTIONS TO LEASED EMPLOYEES.—Section 414(n)(3)(B) is amended by inserting ''401(k), 401(m)'' before ''408(k)''.

(b) PERMITTED COVERAGE OF LEASED EMPLOYEES BY RECIPIENT PLAN.—Paragraph (6) of section 414(n) of the Internal Revenue Code is renumbered as paragraph (8) and a new paragraph (6) is inserted to read as follows:

''(6) RECIPIENT'S PLAN.—

''(A) IN GENERAL.—A recipient may treat a leased employee who is an employee of a qualified staffing firm within the meaning of section 7701(a)(47) as its employee for purposes of providing such individual with employee benefits that are subject to the requirements listed in paragraph (3) or that are described in sections 104, 105, 403(b), 422, and 423. For purposes of the preceding sentence, a 'leased employee' includes an individual who would be a leased employee but for the requirements of paragraph (2)(B).

''(B) TREATMENT OF COVERED INDIVIDUALS.—An individual who receives employee benefits pursuant to subparagraph (A) shall be treated as an employee of the recipient for purposes of the provisions of this title that relate to the recipient's contributions or payments with respect to such benefits, the taxation of a trust, if any, providing such benefits, and the taxation of such benefits to the individual.''.

(v) SPECIAL RULES FOR LEASING ORGANIZATION'S PLAN.—Section 414(n) is amended by inserting the following as paragraph (7):

''(7) LEASING ORGANIZATION'S PLAN.—

''(A) ELECTIVE DISAGGREGATION.—

''(i) GENERAL RULE.—A leasing organization that is a qualified staffing firm may elect to be treated as operating a separate line of business for purposes of section 414(r), without regard to the requirements of subparagraph (A) and (C) of section 414(r)(2), (I) with respect to those employees who perform services for a recipient and related persons, and who would be treated as leased employees of the recipient by for the requirements of paragraph (2)(B), and (II) with respect to those employees who do not meet the requirements of clause (I) and who perform substantially all their services for the leasing organization. In the event the leasing organization elects under this paragraph (7)(A) to be treated as operating separate lines of business, sections 105(h)(3) and (4), 125(c), and 410(b)(5)(B) shall be applied to the relevant plan of the leasing organization by treating the portion of the plan covering employees described in clause (I) as being maintained by the recipient with respect to which the separate line of business relates, and by treating such individuals as employed by the recipient.

''(ii) EFFECT OF DISQUALIFICATION.—If the plan of a leasing organization electing under this paragraph (7)(A) fails to satisfy the requirements of section 410(b) or section 401(a)(4), with respect to a separate line of business, only that portion of the plan covering the employees in such line of business shall be disqualified.

''(iii) TREATMENT OF RELATED PERSONS.—For purposes of this subparagraph (A), the term ''recipient'' shall not include any person that is a related person with respect to the leasing organization.

''(B) HIGHLY COMPENSATED EMPLOYEES.—Whether or not the leasing organization makes an election under subparagraph (A), section 414(q) shall be applied to employees of a leasing organization that is a qualified staffing firm by treating the employees who perform services for a recipient or related persons and who would be leased employees of the recipient but for the requirements of paragraph (2)(B) as employed by, and receiving compensation from, the recipient or the related person for purposes of determining whether the employees are highly compensated employees of the leasing organization.''.

SEC. 5. REVISIONS TO SAFE HARBOR PROVISION.

(A) REVISIONS TO SAFE HARBOR PLAN REQUIREMENTS.—Subparagraph (B) of section 414(n)(5) of the Internal Revenue Code is amended to read as follows:

''(B) PLAN REQUIREMENTS.—A plan meets the requirements of this subparagraph if—

''(i) such plan is a money purchase pension plan or a profit-sharing plan, with a nonintegrated employer contribution rate for each participant which is at least 3 percent of that portion of the participant's compensation attributable to services performed for the recipient, and which is not dependent on the current or accumulated profits of the leasing organization or on whether the participant makes an elective contribution or employee contribution to such plan,

''(ii) such plan provides for full and immediate vesting,

''(iii) if the plan is a profit-sharing plan, such plan meets the distribution requirements of section 401(k)(2)(B) with respect to all employer contributions, and

''(iv) each employee of the leasing organization who performs services for the recipient immediately participates in such plan.''.

(b) EXTENSION OF SAFE HARBOR RULE TO ADDITIONAL EMPLOYEE BENEFITS.—Paragraph (5) of Section 414(n) of the Internal Revenue Code is amended by adding at the end the following:

''(D) SPECIAL RULE FOR ADDITIONAL EMPLOYEE BENEFITS.—To the extent provided for in regulations issued by the Secretary, in the case of a requirement described in subparagraph (C) of paragraph (3), this subsection shall not apply to any leased employee with respect to service performed for a recipient if—

''(i) such employee is covered by a plan or an arrangement that is maintained by the leasing organization and that meets such requirements as the Secretary shall prescribe in regulations, and

''(ii) leased employees (determined without regard to this paragraph) do not constitute more than 20 percent of the recipient's nonhighly compensated work force.''.

SEC. 6. EFFECTIVE DATE.

The amendments made by this Act shall take effect on the date of the enactment of this Act. In the case of a plan that covers employees who are providing services for a customer pursuant to a contract between a qualified staffing firm and the customer, and that was adopted and in effect before the date of enactment of this Act, such amendments shall not take effect until the first day of the first plan year that begins after the date of enactment of this Act, and the plan shall not be required to be amended to reflect this Act until the end of such plan year.

TRIBUTE TO HUNTINGTON COLLEGE

HON. MARK E. SOUDER

OF INDIANA

IN THE HOUSE OF REPRESENTATIVES

Saturday, September 28, 1996

Mr. SOUDER. Mr. Speaker, in the context of a Congress and a society searching for the truth and meaning, integrity and consistency, it is a privilege for me to offer congratulations to an institution in Indiana's Fourth Congressional District that is dedicated to that and much more. September 20, 1996, marked the beginning of a year-long centennial celebration at Huntington College in Huntington, IN. This small, Christian liberal college is committed to one purpose, to equip men and women to make a Christian impact upon our world.

Founded in 1879 by the Church of the United Brethren in Christ, the college worldview was central to the curriculum and its people. The motto on the college's marquee is ''* * * Ye shall know the truth and the truth shall make you free * * *'' The wisdom of the Biblical passage is also at the heart of our Nation.

Many distinguished people have been associated with Huntington College during its 100-year history. I hope the people who should have been mentioned here, and were not, will forgive me. There are many faculty, staff, administrators, students, alumni, and friends who have helped the college through good times and bad. But I would like to mention just a couple of people with whom you might be familiar.

Former Congressman J. Edward Roush is an alumnus member of the board of trustees. Former Vice President Dan Quayle is a former adjunct faculty member. Dr. Eugene Habecker, president of the American Bible Society, is a former president of Huntington College.

The list could go on, but the last two people I want to mention in association with Huntington College come from humble beginnings as did Huntington College. Orville Merillat, a humble, God-fearing man, used his carpentry skills to begin what has been called America's premier cabinet company, Merillat Industries. His generosity has helped make Huntington College the dynamic institution it is today and his contributions to Christian endeavors around the world has been tremendous.

Finally there is ''baby Hope,'' Guerline Espoire Cloutier, a young child discovered in Haiti by Huntington College students working on a missions trip during January 1996. She was afflicted by hydrocephalus. One of the coordinators of the trip, a parent of an HC student, and a family practice physician, offered to help. That child now has a second chance to live. Her example is so significant because Huntington College exists because the example of another baby born into jumble circumstances central to the Huntington College ideal, Jesus Christ.

Congratulations to Huntington College on its first 100 years.

THE PRODUCTION FLEXIBILITY CONTRACT IN THE AGRICULTURAL MARKET TRANSITION (FREEDOM TO FARM) ACT IS A BINDING GUARANTEE ON THE PART OF THE UNITED STATES

HON. PAT ROBERTS
OF KANSAS
IN THE HOUSE OF REPRESENTATIVES

Saturday, September 28, 1996

Mr. ROBERTS. Mr. Speaker, as the adjournment of the 104th Congress nears adjournment today, it is a proper time to review the changes that have been made in farm programs—I refer to it as Freedom To Farm—and what farmers and producers can expect, during the 1996 through 2002 period, in the way of guaranteed fixed—albeit declining—payments on their production flexibility contracts with the Federal Government—the Commodity Credit Corporation.

Nearly all U.S. farmers and producers have signed-up for the production flexibility contract with the USDA Consolidated Farm Service Agency, and from all reports I believe it is widely endorsed by farmers, consumers, rural communities, and rural credit providers, and many others. It reverses 60 years of over-regulation of farmers and producers by the Federal Government and gives them the flexibility to apply good financial management practices and good environmental management practices on their farms.

The reason that I make this statement today is to provide some legislative history and background for those farmers who have signed a contract with the USDA's Commodity Credit Corporation and may be aware that President Clinton released a statement on April 4, 1996 when he signed the Federal Agriculture Improvement and Reform [FAIR] Act of 1996 (Public Law 104–127) claiming he planned to submit legislation in 1997 to amend the FAIR Act.

I will review the provisions of the enactment of the Freedom to Farm Act (Public Law 104–127), its legislative history, and analyze a recent and relevant Supreme Court decision that sets forth standards for Federal Government liability under similar contracts.

Title I of the "Agricultural Market Transition Act" (Public Law 104–127, 110 Stat. 896, April 4, 1996) states in section 101(b), as noted in pertinent part below, part of the purpose of the Act:

(b) PURPOSE.—It is the purposes of this title—

(1) to authorize the use of binding production flexibility contracts between the United States and agricultural producers to support farming certainty and flexibility while ensuring continued compliance with farm conservation and wetland protection requirements;.

The conference report (H. Rept. 104–494, dated March 25, 1996) explains the origin of the language in section 101(b) quoted above and adoption of the House provision by the conferees:

SUBTITLE A—PURPOSE AND DEFINITIONS

(2) PURPOSE

The House bill states that it is the purpose of this title to authorize the use of binding production flexibility contracts between the United States and producers; to make nonrecourse marketing assistance loans; to improve the operation of the peanut and sugar programs and; to terminate price support authority under the Agricultural Act of 1949. (Section 101).

The Senate amendment has no comparable provision.

The Conference substitute adopts the House provision with an amendment deleting the reference to the Agriculture Act of 1949 and adding a reference to the establishment of the Commission on 21st Century Production Agriculture. (Section 101).

When the farm bill—later to become Public Law 104–127—was debated on the House floor an inquiry was made about the contractual aspects of production flexibility contract. (See CONGRESSIONAL RECORD, February 29, 1996, H. 1539):

Let me first say that it is clearly the intent of Congress that the market transition payment provided by the 7-year production flexibility contract is an express and unmistakable contract between the United States and the owner and operator of farmland. Because the market transition payment is based on the 7-year contract it is the intent of the legislation that the payment is guaranteed.

When the conference report was taken up on the House floor, the production flexibility contract was explained as follows (CONGRESSIONAL RECORD, p. H3141, March 28, 1996):

The guarantee of a fixed (albeit declining) payment for seven years will provide the predictability that farmers have wanted and provide certainty to creditors as a basis for lending. The current situation in wheat, corn and cotton under which prices are very high, but large numbers of producers have lost their crops to weather or pests would be corrected by FFA. Those producers last year could not access the high prices without crops, and instead of getting help when they need it most, the old system cuts off their deficiency payments and even demands that they repay advance deficiency payments. FFA insures that whatever government financial assistance is available will be delivered, regardless of the circumstances, because the producer signs a binding contract with the Federal Government for the next seven years.

The debate on Title I of the conference report on the FAIR bill in the House and in the Senate is replete with references to "contract", "guarantee", "binding contract" and similar references. The production flexibility contract (USDA—CCC Form 478) speaks in terms of contract acreage, contract crop, and the ability of CCC representatives to enter onto the producer's farm to determine "compliance with the contract".

The fact that the production flexibility contracts were intended to carry with them a guarantee of payments barring failure of the producer to comply with certain statutorily impress conditions for compliance is clearly illustrated. Given that, it should follow that these production flexibility contracts represent vested legal rights in owners or producers that could be altered by subsequent enactment, except that those legal rights could be enforceable against the Government for damages if for some reason funding were not made available during the 7-year period of the contract contemplated in the AMT Act.

The ruling of the Supreme Court in the case of *United States Winstar et al,* 116 S. Ct. 2432 (1996) should serve as a precedent and should apply in the event there is an amendment to the Agricultural Market Transition Act prior to 2002 that could have the effect of breaching the contractual obligations of the Government to fulfill the provisions of the production flexibility contract.

The Winstar case held that Federal bank regulations that implemented the 1989 Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) (Public Law 101–73, see particularly 12 U.S.C. 1464(t)) imposed new capital requirements on savings and loan associations in derogation of promises made in pre-1989 agreements that allowed financial institutions willing to take over failing institutions to use certain accounting devices to satisfy capital requirements and this constituted a breach of contract for which the Government was liable in damages.

The United States in the Winstar case raised the "unmistakability defense" to the effect that a "public or general" sovereign act such as FIRREA's alteration of capital reserve requirements (that reversed the earlier permission of certain savings and loan institutions to use certain accounting devices) could not trigger contractual liability for the Government.

However, the unmistakability defense or doctrine states that "sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms." *Merrion* v. *Jicarilla Apache Tribe,* 455 U.S. 130, 148 (1982). The application of this doctrine turns on whether enforcement of the contractual obligation alleged would block the exercise of a sovereign power of the Government. U.S. versus Winstar Corp., supra.

As opposed to attempts to bind Congress from enacting regulatory measures inconsistent with the contracts, the contracts in Winstar allocate or shift the risks incurred by the parties. The plaintiff Winstar did not assert that the Government could not change the capitalization requirements applicable to the plaintiff, but that the Government assumed the risk that where subsequent changes prevented the plaintiff from performing under the agreement that the Government would be held liable for financial damages. So long as such contract is reasonably construed to include a risk-shifting component that may be enforced without effectively barring the exercise of that power, the enforcement of the risk allocation raises nothing for the unmistakability doctrine to guard against, and there is no reason to apply it. United States versus Winstar, supra.

Under the Production Flexibility Contract, risks are allocated the parties. As opposed to prior farm programs, the producers agree to accept the risk of fixed payments unrelated to national supply or established target prices in exchange for the Government's acceptance of the risk of less control over supplies of various types of agricultural commodities. As in *Winstar*, the issue does not turn on whether the Government can subsequently change the rules under which producers operate if they elect to participate in a program, the issue is whether enforcing the risks shifted among the parties will infringe upon the sovereign jurisdiction of the United States. Where changes in the Production Flexibility Contract by the Government result in a financial liability to the producer, the Government is liable to the producer for a breach of contract and damages.